OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

June 1, 2001

Ms. Sara A. Hartin
City Attorney
City of Copperas Cove
P.O. Drawer 1449
Copperas Cove, Texas 76522

OR2001-2271

Dear Ms. Hartin:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 147858.

The City of Copperas Cove (the "city") received a request for "all memos issued from the City Manager's Office in the last sixty (60) days." You state that the city has already released seven responsive documents. You claim that the four remaining documents, or portions thereof, are excepted from disclosure under sections 552.102, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information at issue. We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (allowing interested person to submit written comments stating reasons why particular information should or should not be released).

Section 552.103 provides as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> . . . .

> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You wish to withhold the following information under section 552.103:

1) Paragraph 1 of Exhibit B, which is a memo dated February 1, 2001;

2) Exhibit C, which is a memo dated February 22, 2001; and

3) Paragraph 5 of Exhibit E, which is a memo dated February 27, 2001.

You state that each of these items of information concerns pending litigation in the 52nd District Court of Coryell County between the city and a named individual. You have submitted a copy of several pleadings from that case. Based on your representation and our review of the submitted pleadings, we agree that litigation was pending at the time of the request. We also agree that this information relates to the pending litigation. Therefore, the city may withhold 1) paragraph 1 of Exhibit B, 2) Exhibit C, and 3) Paragraph 5 of Exhibit E under section 552.103 of the Act.[1]

Next, you claim that paragraph 5 of Exhibit B is protected by section 552.103 as information that relates to reasonably anticipated litigation. To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision

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[1]Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.[2] Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

Here, you state that the information contained in paragraph 5 concerns the leaky roof at the newly-constructed library and invoicing and construction problems at the new Central Fire Station (the "fire station"). You claim that the city reasonably anticipates litigation with Quicksilver Construction Co. ("Quicksilver") in these two matters. In support of this claim, you have submitted two pieces of correspondence relating to the problem at the library and three pieces of correspondence relating to the problems at the fire station. You also state that the city council discussed "this potential lawsuit" in executive session on February 20, 2001, and that a sub-contractor has filed two claims against Quicksilver. You have also submitted those third-party claims for our review.

Based on the foregoing facts, we do not believe that litigation was reasonably anticipated at the time of the request. First, there are no specific threats of litigation in any of the submitted letters. *See* Open Records Decision No. 551 (1990) (where attorney's letter demands damages and threatens to file suit, litigation is reasonably anticipated), 518 (1989) (litigation exception requires concrete evidence that the claim that litigation may ensue is more than mere conjecture). Second, the submitted claims filed by a third party against Quicksilver do not demonstrate any objective steps taken towards litigation between Quicksilver and the city. *See* Open Records Decision No. 392 (1983) (litigation exception only applies where litigation involves or is expected to involve the governmental body that is claiming the exception). Third, the fact that the city council discussed the possibility of litigation in executive session does not necessarily mean that litigation was reasonably anticipated. *See* Open Records Decision Nos. 557 (1990) (mere contemplation of future litigation by governmental body is not sufficient to invoke litigation exception), 452 (1986) (whether litigation is reasonably anticipated must be determined on a case-by-case basis). Because you have not adequately demonstrated that litigation concerning the information in paragraph 5 of Exhibit B was reasonably anticipated at the time of the request, the city may not withhold that paragraph under section 552.103 of the Act.

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[2]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

We next address your claim that Exhibit D is protected from disclosure by section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685.

Exhibit D is a memo from the City Manager to the Director of Solid Waste (the "director") concerning the director's management of the Solid Waste Department and listing specific suggestions for improvement. The memo at issue relates solely to an employee's actions while acting as a public servant and the conditions for continued employment, and as such cannot be deemed to be outside the realm of public interest. *See* Open Records Decision Nos. 473 (1987) (even highly subjective evaluations of public employees may not ordinarily be withheld under section 552.102), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). 316 (1982) (information is not excepted by common law privacy merely because it might embarrass individuals or governments). Therefore, the city may not withhold Exhibit D under section 552.102.

Lastly, you claim that Paragraph 4 of Exhibit B and Paragraph 1 of Exhibit E are excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure

purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

We find that Paragraph 4 of Exhibit B and Paragraph 1 of Exhibit E are internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the city. Thus, the city may withhold those two paragraphs under section 552.111.

To summarize: The city may withhold 1) paragraph 1 of Exhibit B, 2) Exhibit C, and 3) Paragraph 5 of Exhibit E under section 552.103 of the Act. The city may not withhold paragraph 5 of Exhibit B under section 552.103 and may not withhold Exhibit D under section 552.102. The city may withhold Paragraph 4 of Exhibit B and Paragraph 1 of Exhibit E under section 552.111.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

June B. Harden
Assistant Attorney General
Open Records Division

JBH/SPA/seg

Ref: ID# 147858

Encl. Submitted documents

cc: Mr. Frank DiMuccio, Jr.
2314 East Highway 190
Copperas Cove, Texas 76522
(w/o enclosures)